No. 82-1456

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN GERI-CARE, INC., PETITIONER
v.
NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner discharged an employee because of her union activities and her attendance at a Board meeting.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A22) is reported at 697 F.2d 56. The decision and order of the National Labor Relations Board (Pet. App. A29-A43) and the decision of the administrative law judge (Pet. App. A44-A105) are reported at 258 N.L.R.B. 1116.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1982, and a petition for rehearing was denied on January 21, 1983 (Pet. App. A23-A24). The petition for a writ of certiorari was filed on March 1, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner is a New York corporation engaged primarily in providing health care, staffing and related services to medical institutions in the greater New York City area. At all times relevant to this case, petitioner was under contract to manage the nursing and dietary departments of the Aischel Avraham Nursing Home in Brooklyn, New York ("the Home"). During the fall of 1979,[1] two rival unions, Local 144[2] and Local 6,[3] launched campaigns to organize petitioner's 13 registered nurses who work at the Home (Pet. App. A3-A4, A46-A49).

Petitioner, who opposed the organizing efforts, became aware that employee Shirley Anenburn was an active supporter of Local 144 (Pet. App. A89). Thus, on November 7, 1979, Director of Nursing Services Evelyn Milano informed her assistant, Juanita Palma, that Anenburn had attended a Local 144 meeting (Pet. App. A57, A89). At approximately the same time, Milano also told Palma that she did not intend to grant a request for leave that Anenburn had filed in October and that she "want[ed Anenburn] out" (Pet. App. A61).

On November 15 an NLRB hearing was scheduled to consider Local 144's representation petition. Anenburn, who had been subpoened to testify on behalf of Local 144, attended the hearing and was seen there by Milano and Company Secretary Stern. Stern was aware that Anenburn was present as a witness for Local 144 (Pet. App. A5 n.5, A52, A58).

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[1]All dates refer to 1979 unless otherwise indicated.

[2]Local 144, Hotel, Hospital, Nursing Home and Allied Health Services Union, SEIU, AFL-CIO.

[3]Local 6, International Federation of Health Professionals, International Longshoremen's Association, AFL-CIO.

On November 16, the day after the representation hearing, Anenburn received a written warning citing 12 instances of "tardiness" that allegedly occurred between September 8 and November 3. Most of the alleged instances had been excused (Pet. App. A53, A59). On the following day, Milano gave Anenburn formal notice that Anenburn's October 19 request for two weeks' personal leave would not be granted (Pet. App. A53, A60-A61). Four days later, on November 21, petitioner terminated Anenburn allegedly on account of an incident that occurred on November 20 involving patient Serena Dimant.

When Dimant became ill on the morning of November 20, Anenburn promptly paged Assistant Director of Nursing Palma and told her that she needed assistance on the third floor because Dimant was having trouble breathing. When Palma arrived on the third floor, she observed Anenburn following established nursing procedures and checking Dimant's vital signs. Anenburn continued to attend to Dimant while Palma made arrangements for an ambulance to take Dimant to a hospital (Pet. App. A11, A67-A71).

Later that morning Anenburn received a telephone call from a neighbor who informed Anenburn that her mother had suddenly become ill. Anenburn was also told that a similar message had been left for her earlier that morning. Upset that her mother was ill and that she had not received the earlier message, Annenburn decided to go to the nursing office on the first floor to find out why she had missed the previous call. At the time Anenburn left the third floor, nursing supervisor Wilson and licensed practical nurse Hackshaw were present on the floor. On her way to the nursing office, Anenburn met Palma in the elevator. Seeing that Anenburn was distraught and learning that Anenburn's mother was ill, Palma gave Anenburn permission to

leave for the day. Shortly thereafter, Anenburn punched out and went home (Pet. App. A12, A32 n.1, A65-A66, A69-A71).

Later that evening, Milano telephoned Anenburn at her home and told her that she was required to bring a note from a physician stating that her mother was hospitalized. Anenburn explained to Milano that her mother was diabetic and hypertensive, and that when she arrived home that day she found that her mother's condition did not require hospitalization or a doctor's attention. Consequently, she explained, she would not be able to obtain the doctor's note (Pet. App. A12, A66). The following day, Anenburn was summoned to meet with Milano and Company Secretary Stern. When Stern denied Anenburn's request that another employee be present during the interview and Anenburn said that she did not want to meet with Milano and Stern alone, Stern discharged Anenburn (Pet. App. A12-A13, A67). Prior to her union activity, Anenburn had an exemplary work record and had been complimented for her work performance on several occasions by, among others, Milano (Pet. App. A8, A69).

Approximately two weeks prior to the December 20 representation election, Milano met with a group of registered nurses, urged them to vote for management, and promised them a "good contract" if they voted for petitioner (Pet App. A53, A82-A84). In the December 20 election, the majority of unit employees voted against union representation, with five ballots cast against the participating unions, three for Local 144 and none for Local 6 (Pet. App. A46-A47, A53). On January 1, 1980, the Company granted the nurses an across-the-board wage increase and an additional week's vacation (Pet. App. A82).

2. The Board, adopting the decision of the administrative law judge, held that petitioner violated Section 8(a)(3), (4) and (1) of the Act, 29 U.S.C. 158(a)(3), (4) and (1), by

discharging employee Anenburn because of "her union related activities and because of her appearance at a representation hearing" (Pet. App. A98). In finding that Anenburn's discharge was unlawful, the ALJ relied on petitioner's animus towards Local 144, the timing of the discharge, which occurred "within a few days of Anenburn's appearance at the Board hearing," and the other instances of unlawful harassment in which the Company engaged in retaliation for Anenburn's union-related activities (Pet. App. A88-A90).[4] The ALJ further found that petitioner's proffered explanation for the discharge — Anenburn's alleged abandonment of a sick patient — was pretextual (Pet. App. A70, A90). In so finding, the ALJ noted that at the time Anenburn left the floor Dimant was being attended to by one or two registered nurses as well as by a licensed practical nurse, that Anenburn had provided proper nursing care to Dimant, and that management officials were aware that Anenburn had received permission to leave from Assistant Director of Nursing Palma (Pet. App. A70-A72). The Board ordered petitioner to reinstate Anenburn with backpay (Pet. App. A100).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. A1-A22). It rejected petitioner's contention that "Anenburn [had] abandoned a dying patient" (Pet. App. A14), specifically noting (Pet. App. A16) that there was "substantial evidence to support the

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[4]The Board, upheld by the court of appeals, found that petitioner had violated Section 8(a)(4) and (1) of the Act by issuing a warning slip to Anenburn and denying her request for leave because of her union-related activities, including her appearance at a representation hearing. Pet. App. A8-A11, A88-A89, A98. In addition, the Board, again affirmed by the court of appeals, found that petitioner had violated Section 8(a)(1) of the Act by promising and granting employees benefits to induce them to refrain from supporting either of the unions (Pet. App. A19-A22, A93-A95, A98-A99). Petitioner does not contest these findings (Pet. 4 n.3).

Board's finding that management's explanation for Anenburn's discharge was clearly pretextual." The court declined to consider petitioner's contention, repeated here, that the Board's *Wright Line* decision (see *infra*, pages 6-7) impermissibly shifted the burden of proof to petitioner, concluding (Pet. App. A16-A17) that the burden shifting rule formulated in *Wright Line* is applicable only to dual motive,[5] not to pretext, cases.[6]

ARGUMENT

Petitioner contends that this case involves an application of the test articulated by the Board in *Wright Line, a Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), concerning allocation of the burden of proof in "dual motive" cases. Because the propriety of the Board's *Wright Line* test is under review in *NLRB* v. *Transportation Management Corp.*, cert. granted, No. 82-168 (Nov. 15, 1982), petitioner urges that review is appropriate here as well. However, unlike *Transportation Management*, this is not a dual motive case. Rather, the issue involved here is simply whether substantial evidence supports the Board's finding that petitioner's proffered ground for discharging employee Anenburn was pretextual, and that, consequently, she was discharged solely because of her union-related activities. That issue does not warrant further review by this Court.

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[5]Dual motive cases are those in which a discharge or other disciplinary decision is motivated by both legitimate and unlawful considerations.

[6]In a subsequent dual motive case, the Second Circuit held that the burden-shifting aspect of the Board's *Wright Line* decision is contrary to the requirements of the Act. *NLRB* v. *New York University Medical Center*, No. 82-4137 (Jan. 21, 1983).

Under the Board's *Wright Line* test, if the General Counsel has established that opposition to an employee's protected activities was "a motivating factor" in the employer's decision to discharge an employee, the employer can prevail only by showing by a preponderance of the evidence that it would have taken the same action "even in the absence of the protected conduct." *Wright Line, supra,* 251 N.L.R.B. at 1089 (footnote omitted). The First Circuit rejected the *Wright Line* test insofar as it places on an employer the burden of proving, rather than merely producing evidence, that it would have taken the same action for legitimate reasons. *NLRB* v. *Wright Line, a Division of Wright Line, Inc.*, 662 F.2d 899, 904-905 (1981), cert. denied, 455 U.S. 989 (1982). See also, *e.g., NLRB* v. *New York University Medical Center,* No. 82-4137 (2d Cir. Jan. 21, 1983); *NLRB* v. *Transportation Management Corp.*, 674 F.2d 130 (1st Cir. 1982), cert. granted, No. 82-168 (Nov. 15, 1982). Contra *NLRB* v. *Fixtures Mfg. Corp.*, 669 F.2d 547, 550 n.4 (8th Cir. 1982); *Zurn Industries, Inc.* v. *NLRB,* 680 F.2d 683, 686-693 (9th Cir. 1982), petition for cert. pending, No. 82-1166 (filed Jan. 6, 1983).

The burden-shifting aspect of the Board's test, which is at issue in *Transportation Management,* however, applies only to cases in which it has been shown that the employer had two motives, one lawful and one unlawful. As the Board explained at the outset of its decision in *Wright Line, supra,* 251 N.L.R.B. at 1084, if examination of the employer's evidence reveals that "the asserted justification is a sham in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon," no further analysis of motive is necessary, for it is apparent that animus toward the employee's concerted activities was the only reason for the discharge. In such a situation the burden-shifting aspect of the *Wright Line* test does not come into play. Indeed, although it rejected the burden-shifting aspect of the *Wright Line* test, the First

Circuit enforced the Board's order in *Wright Line* because it agreed that the alleged legitimate reason for the discharge in that case was a pretext. *NLRB* v. *Wright Line, supra,* 662 F.2d at 907 n.13 (1981).

Here, too, the Board found that the General Counsel had affirmatively established that the reason offered by petitioner for the discharge of Anenburn was pretextual, and the court of appeals agreed that that finding was supported by substantial evidence.[7] Accordingly, the only issue presented by the petition is whether the Board's finding of pretext is supported by substantial evidence, an issue that does not warrant review by this Court. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).[8]

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[7]Petitioner's contention that the ALJ analyzed the case as a dual motive discharge case and consequently impermissibly shifted the burden of proof is without merit. On several occasions (Pet. App. A70, A90) the ALJ expressly stated that he found petitioner's proffered explanation for Anenburn's discharge to be pretextual. Contrary to petitioner's assertion (Pet. 11), the ALJ's observation (Pet. App. A90) that "the 'same action would have taken place even in the absence of the protected conduct' " is no indication that he employed a dual motive analysis. Rather, when the phrase is read in context — "[a]s noted above, I regard [petitioner's] contention that Anenburn was terminated for leaving a sick patient as mere pretext. Clearly, therefore [petitioner] has not shown that the " 'same action would have taken place even in the absence of the protected conduct' " (Pet. App. A90) —it is apparent that the ALJ was simply noting that a finding of pretext conclusively undermined petitioner's claim that the discharge was for a legitimate reason. As noted above (*supra,* page 7), once it is established that an employer's reasons for a discharge are pretextual, it follows that issues concerning "the niceties of burdens of proof" do not arise. Pet. App. A18, quoting *NLRB* v. *Magnesium Casting Co.,* 668 F.2d 13, 16 (1st Cir. 1981).

[8]The Court recently declined to review a case in which the petitioner contended that the Board's finding that petitioner's asserted legitimate reason for discharge of two employees was pretextual involved an application of the burden-shifting aspect of the Board's *Wright Line* test. *Brewton Fashions, Inc.* v. *NLRB,* cert. denied, No. 82-1209 (Apr. 4, 1983).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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